

THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

CASE NO.: 2:23-cv-01495-JHC

PLAINTIFFS' MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS RELATED TO
SPOILIATION

NOTE ON MOTION CALENDAR:
May 10, 2024

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INTRODUCTION

Amazon is a company that tightly controls what its employees put into writing. It famously uses dense six-page memos that conform to detailed guidelines rather than PowerPoint decks or other common types of business documents, and it sets internal mandates on how employees discuss sensitive topics, including competition. But Amazon’s senior leadership also used another channel for internal communications and avoided the need to talk carefully by destroying the records of their messages.

For years, Amazon’s top executives, including founder and former CEO Jeff Bezos, “discuss[ed] sensitive business matters, including antitrust, over the Signal encrypted-messaging app instead of email.” Ex. A at 9.¹ These executives turned on Signal’s “disappearing message” feature, which irrevocably destroys messages, even after Amazon was on notice that Plaintiffs were investigating its conduct. (Am. Compl. ¶ 39.) Plaintiffs bring this motion to compel Amazon to produce documents related to the company’s failure to preserve Signal messages, namely Amazon’s document preservation notices and its instructions about the use of ephemeral messaging applications, including Signal.

As to both sets of documents, Plaintiffs easily meet the “preliminary showing of spoliation” standard required to overcome Amazon’s privilege assertions. There is ample evidence suggesting that spoliation occurred. Key Amazon executives, including Mr. Bezos, conducted Amazon business using Signal for years. Amazon executives deleted many Signal messages during Plaintiffs’ pre-Complaint investigation, and Amazon did not instruct its employees to preserve Signal messages until over fifteen months after Amazon knew that Plaintiffs’ investigation was underway. It is highly likely that relevant information has been

¹ Citations in the form Ex. ___ refer to the exhibits to the Declaration of Emily K. Bolles filed in support of this Motion.

1 destroyed as a result of Amazon’s actions and inactions. Plaintiffs should be allowed discovery
 2 into Amazon’s document preservation efforts (or the lack thereof) so that they can determine the
 3 full extent of the possible spoliation.

4 **BACKGROUND**

5 **A. Amazon’s Destruction of Signal Messages**

6 While the true breadth of Amazon’s use of the Signal app is yet unknown, Amazon
 7 admits that dozens of its employees used the app, Ex. B, and that some used it for “substantive
 8 work communications potentially responsive to” pre-Complaint compulsory process. Ex. C at 3.
 9 Notable Signal users at Amazon identified to date include Mr. Bezos, current CEO Andy Jassy,
 10 General Counsel David Zapolsky, former CEO of Worldwide Consumer Jeff Wilke, and former
 11 CEO of Worldwide Operations Dave Clark. Ex. B. These executives played key roles in
 12 developing and implementing Amazon’s anti-discounting and fulfillment strategies that are at
 13 issue in this case. (*See* Am. Compl. ¶¶ 329-30, 364, 404-407.) Amazon’s use of Signal was
 14 instigated by Mr. Bezos and his team. Ex. E; Ex. F at 279:20-25; Ex. G at 203:2-4; 208:17-209:2.
 15 From messages that were not deleted, it is apparent that Amazon executives used Signal to talk
 16 about competition-related business issues. *See, e.g.*, Ex. H (messaging about an antitrust news
 17 article); Ex. I (messaging about a contract with USPS); Ex. J (messaging about advertising); Ex.
 18 A at 9 (reporting that Amazon executives used Signal to discuss antitrust).

19 Amazon executives manually enabled Signal’s “disappearing message” feature, which
 20 permanently and irretrievably deletes messages after a time period set by the user.² When this

23 ² Signal Support: Set and Manage Disappearing Messages, [https://support.signal.org/hc/en-](https://support.signal.org/hc/en-us/articles/360007320771-Set-and-manage-disappearing-messages)
 24 [us/articles/360007320771-Set-and-manage-disappearing-messages](https://support.signal.org/hc/en-us/articles/360007320771-Set-and-manage-disappearing-messages) (last visited April 25, 2024) (noting that “when the disappearing message timer reaches the end . . . [t]he message is deleted from disk.”).

1 feature is enabled, the sender and all recipients see that it is turned on.³ Although the contents of
2 deleted messages are impossible to recover, the app shows when a user turns the disappearing
3 message feature on, off, or changes the timer for deletions, leaving breadcrumbs showing that
4 Amazon executives' deletions were widespread. *See* Ex. B. As even Amazon admits, due to its
5 executives' use of disappearing messages, "it is possible that some responsive communications
6 have not been preserved." Ex. C at 3.

7 Amazon executives began using Signal in April 2019 and kept using it through Plaintiffs'
8 pre-Complaint investigation. *See* Ex. B. The FTC sent a document preservation letter to Amazon
9 on June 17, 2019, putting Amazon on notice that the FTC was investigating "whether [Amazon]
10 has engaged or is engaging in unfair methods of competition, through anticompetitive or
11 exclusionary conduct related to online retail sales and distribution." Ex. K at 1. That letter
12 specifically instructed Amazon to "take the necessary measures to preserve all documents and
13 information and cease all document destruction activities with respect to matters that may be of
14 relevance to this investigation," and expressly included "electronic correspondence" in its ambit.
15 *Id.* The FTC subsequently sent a request for documents to Amazon on August 5, 2019, and
16 served a Civil Investigative Demand on February 20, 2020. Bolles Decl. ¶ 4. Amazon issued a
17 first wave of document preservation notices to its employees on July 2, 2019, but did not issue a
18 preservation notice to Mr. Bezos (then Amazon's CEO) until over nine months later, on April 13,
19 2020. Ex. D at 3. Amazon did not send custodian questionnaires or conduct custodian interviews
20 until Summer 2020, a full year after it received the FTC's document preservation letter. *See id.* at
21 10. Amazon claims that it did not learn about its employees' use of Signal until the summer of
22

23 _____
24 ³ *Id.* ("Each and every disappearing message will have a timer countdown icon that is visible at the bottom of the message bubble.").

2020, *see* Ex. L at 3, even though Amazon’s top executives, including its General Counsel Mr. Zapolsky, had been using Signal since 2019. Ex. B at 4.

After the summer of 2020, Amazon provided new guidance about Signal, but employees kept using the app and kept deleting messages. In October 2020, Amazon provided “secure messaging guidance for senior leaders.” Ex. M. Amazon issued further instructions in August 2021, including a guide about how to turn off Signal disappearing messages. *See id.* (privilege log identifying “Legal Hold FAQ that includes guidance on Signal,” dated August 27, 2021); Ex. N (guidance titled “How turn [sic] off disappearing messages on Signal”; redactions in original); Ex. O at 189:11-17 (corporate representative testifying that a link to Ex. N is embedded in the “Legal Hold FAQ”). Seven months later, on March 2, 2022, Mr. Zapolsky sent an email to several executives instructing them how to download a new Amazon-owned secure messaging app, Wickr, that allows Amazon to save messages centrally for individuals on legal hold. *See* Ex. P (redactions in original). All the while, Amazon executives continued to use Signal’s disappearing message feature to destroy records of their internal communications. *See* Ex. B (showing use of Signal disappearing messages until at least May 2022).⁴

On March 4, 2022, two days after Mr. Zapolsky asked executives to switch to a different secure messaging app, Amazon disclosed its use of Signal to Plaintiffs for the first time. Ex. D at 9. Amazon made this disclosure just days before the *Wall Street Journal* publicized Amazon executives’ use of Signal, on March 10, 2022. *See* Ex. A. Once Plaintiffs learned about Amazon’s use of Signal, and the ensuing potential for spoliation, Plaintiffs requested that Amazon log Signal messages and deleted messages for a targeted group of custodians, *see* Ex. B;

⁴ Amazon only logged Signal use through May 2022. *See* Ex. B at 1 (“this log includes potentially work-related Signal communications through May 2022.”). Plaintiffs have requested and the parties are currently negotiating production of Signal messages past May 2022. Whether and when Amazon employees stopped using Signal for work is unknown.

1 conducted in-person reviews of certain Signal messages that still exist, *see* Ex. D at 1; conducted
 2 an investigational hearing of the company related to its preservation efforts and use of Signal, *see*
 3 Ex. O; and questioned several witnesses about their Signal usage in investigational hearings, *see*
 4 Ex. F (excerpt of Signal discussion with Mr. Bezos); Ex. G (excerpt of Signal discussion with
 5 Mr. Blackburn).

6 Amazon claimed privilege over the contents of its preservation notices and instructions
 7 throughout Plaintiffs' investigation. *See* Ex. O at 108:19-20 (Amazon's counsel stating "[w]e
 8 view the contents of the hold notice as privileged."); Ex. F at 287:4-288:16 (instructing Mr.
 9 Bezos not to answer whether Amazon's document preservation notices discussed Signal or
 10 ephemeral messaging on basis of privilege); Ex. D at 2 ("Amazon is not producing th[e] legal
 11 guidance documents in order to maintain privilege . . ."). It refused to say whether its
 12 preservation notices addressed Signal or other ephemeral messaging. *See* Ex. O at 109:14-111:2.
 13 In fact, Amazon did not even educate its corporate witness on the contents of its preservation
 14 notices. *See id.* at 109:25-110:7. An Amazon executive testified, however, that when he received
 15 document preservation notices, he did not understand Signal messages to be covered by those
 16 notices. *See* Ex. G at 221:16-20.

17 **B. Plaintiffs' Requests for Production**

18 On November 14, 2023, Plaintiffs served the following Requests for Production on
 19 Amazon:⁵

20 **RFP No. 25.** All litigation holds, preservation notices, or similar documents sent
 21 by Amazon in connection with the June 17, 2019 preservation letters, August 5,
 22 2019 Voluntary Access Letter, February 20, 2020 Civil Investigative Demand,
 23 and/or September 26, 2023 Complaint in this matter.

24 ⁵ Bolles Decl. ¶¶ 5-6.

1 **RFP No. 27.** All documents relating to instructions or advice given to employees
2 about the use of ephemeral messaging, including but not limited to Signal or Wickr.

3 Amazon has categorically refused to produce any documents responsive to RFP No. 25
4 based on privilege and has also refused to produce certain documents and portions of documents
5 responsive to RFP No. 27 on the same grounds. Ex. Q at 3; Ex. R at 5. The parties have met and
6 conferred several times but are at an impasse. Bolles Decl. ¶ 2. Plaintiffs file this motion to compel
7 Amazon to produce all documents responsive to RFP Nos. 25 and 27 despite Amazon's
8 generalized assertions of privilege.

9 **LEGAL STANDARD**

10 A preliminary showing of spoliation overcomes the protections against disclosure that
11 may otherwise apply to document preservation notices. *See Agne v. Papa John's Int'l, Inc.*, No.
12 2:10-cv-01139-JCC, 2012 WL 12882903, at *3 (W.D. Wash. Feb. 6, 2012); *Al Otro Lado, Inc. v.*
13 *Wolf*, No. 3:17-cv-02366-BAS-KSC, 2020 WL 4432026, at *2 (S.D. Cal. July 31, 2020); *Major*
14 *Tours, Inc. v. Colorel*, No. 1:05-cv-03091-JBS, 2009 WL 2413631, at *2-3 (D.N.J. Aug. 4,
15 2009). The same is true for instructions about preservation, including attorney-client
16 communications about litigation holds or spoliation. *See Stevens v. Brigham Young Univ. -*
17 *Idaho*, No. 4:16-cv-00530-BLW, 2020 WL 7366318, at *4 (D. Idaho Dec. 11, 2020)
18 (“[A]lthough a litigation hold, and general instructions to a client regarding spoliation, would
19 generally be privileged and not subject to disclosure, where, as here, there is evidence of
20 spoliation, such information is discoverable.”); *In re Cathode Ray Tube Antitrust Litig.*, No. 07-
21 cv-05944-JST, 2023 WL 5667882, at *5 (N.D. Cal. Jan. 27, 2023) (“Attorney-client
22 communications regarding litigation holds, in addition to the hold itself, have been ordered to be
23 produced by courts when a preliminary showing of spoliation has been made.”).

A preliminary showing of spoliation means only that “there is reason for concern that evidence has been lost.” *Agne*, 2012 WL 12882903, at *3. Such “reason for concern” can be shown where potentially relevant evidence has been destroyed or where a party failed to take adequate steps to preserve information. *See Al Otro Lado*, 2020 WL 4432026, at *2 (noting that “[e]ither . . . is sufficient to make a preliminary showing of spoliation”). At this juncture, Plaintiffs do not need to prove the prima facie elements of spoliation, prejudice, or intent. *United States v. Cmty. Health Network, Inc.*, No. 1:14-cv-01215-RLY-MKK, 2023 WL 4761664, at *5 (S.D. Ind. July 26, 2023) (“[C]ourts have made the requisite finding of a preliminary showing of spoliation and ordered discovery of litigation holds by focusing on only . . . whether data was lost after the duty to preserve began – and refraining from any extended discussion of fault.”).

ARGUMENT

The Court should find that Plaintiffs have made a preliminary showing of spoliation on two independent grounds: because Amazon destroyed potentially relevant Signal messages and because Amazon failed to take adequate steps to preserve Signal messages. Based on that showing, the Court should order Amazon to produce its hold notices and instructions about preservation because these documents will assist Plaintiffs and the Court in determining the scope of spoliation in this case.

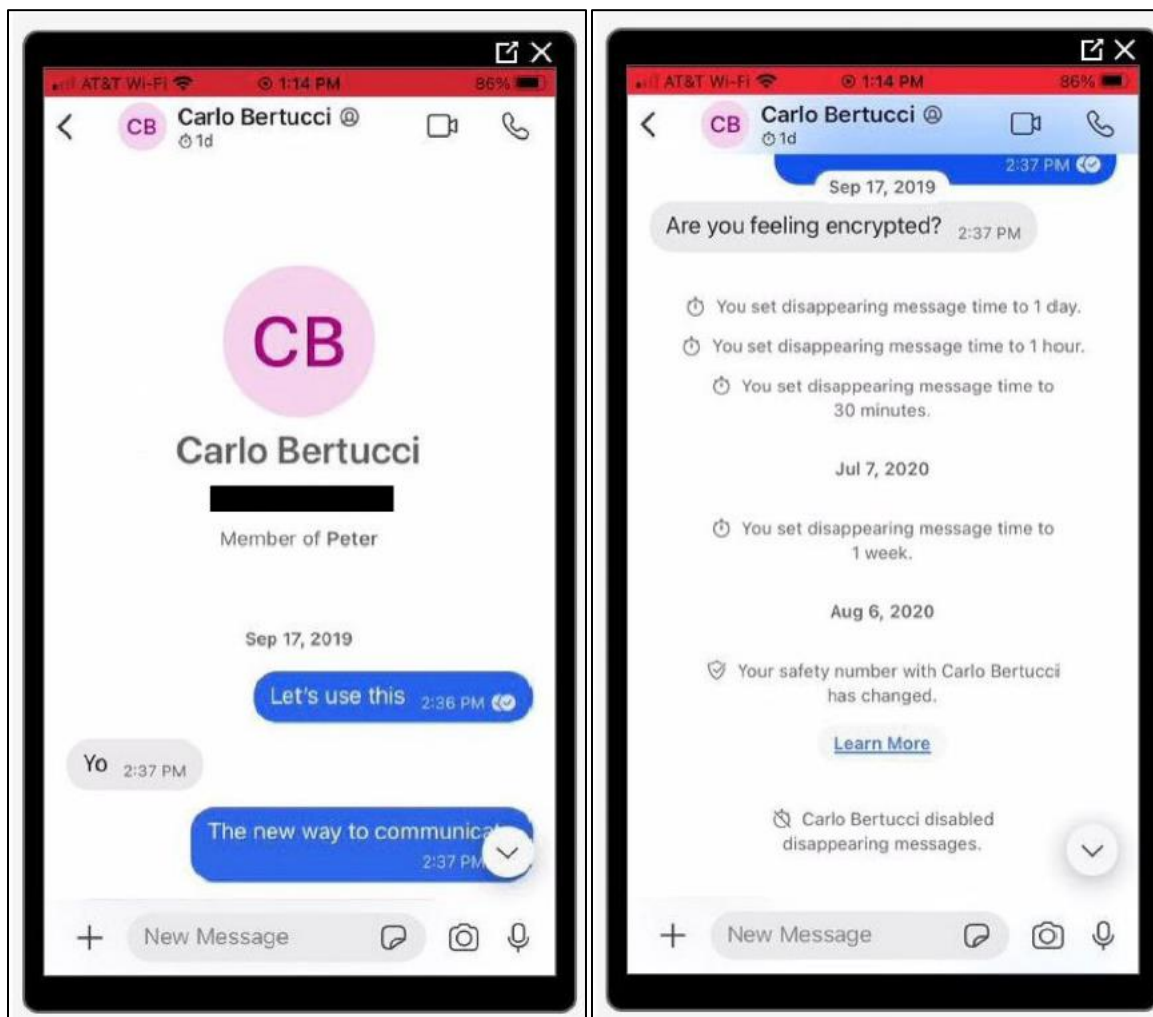
I. AMAZON’S WIDESPREAD DELETION OF SIGNAL MESSAGES DURING PLAINTIFFS’ PRE-COMPLAINT INVESTIGATION ESTABLISHES A PRELIMINARY SHOWING OF SPOLIATION.

Evidence that a party destroyed potentially relevant documents is sufficient to establish a preliminary showing of spoliation. *See Al Otro Lado*, 2020 WL 4432026, at *2 (finding preliminary showing of spoliation where it was undisputed that a witness’s notes were destroyed, and the court found those notes were “*potentially* relevant”).

1 It is undisputed that Amazon deleted numerous Signal messages. *See generally* Ex. B.
2 Plaintiffs are not required to prove the contents of the messages Amazon destroyed to show that
3 they were potentially relevant. One court found a defendant's loss of "mailboxes and OneDrive
4 data of a certain subset of the many custodians involved in this case" sufficient where the
5 custodians in question "were involved in the acts and decisions underlying the claims and
6 defenses in this case." *Cnty. Health Network*, 2023 WL 4761664, at *5. Another court
7 recognized that "because [a witness's] notes were destroyed, it is impossible for the Court to say
8 whether defendants' subjective characterization of the notes as 'shorthand, non-substantive
9 notes' that did not contain information relevant to this case is correct." *Al Otro Lado*, 2020 WL
10 4432026, at *2.

11 The facts here paint a clear picture. Amazon admits "it is possible that some responsive
12 communications" were destroyed. Ex. C at 3. Senior Amazon executives who are known to have
13 deleted Signal messages were involved in acts and decisions relevant to the claims in this case,
14 and they deleted those messages during Plaintiffs' pre-Complaint investigation after Amazon
15 received a document preservation letter, a voluntary access letter, and a civil investigative
16 demand. *See generally* Ex. B (Amazon log identifying Amazon executives' use of Signal's
17 disappearing messaging feature during the time period April 2019 through May 2022); Ex. K
18 (document preservation letter dated June 17, 2019); Bolles Decl. ¶ 3 (Voluntary Access Letter
19 sent Aug. 5, 2019); *id.* ¶ 4 (Civil Investigative Demand served Feb. 20, 2020). Amazon
20 employees used Signal to talk about antitrust and competition-related business topics shortly
21 before turning disappearing messages on. *See* Ex. H; Ex. I; Ex. J. For example, two days after
22 Amazon Legal sent an email to Amazon's senior leadership team, or "S-team," titled "RE:
23 Congressional and FTC investigations into Amazon - privileged & confidential," *see* Ex. S
24

(excerpt of privilege log), two Amazon executives started using Signal and immediately turned on disappearing messages.⁶



Public reporting corroborates that Amazon executives used Signal to discuss antitrust issues. *See* Ex. A at 9. This evidence surpasses the bar set by other cases and by itself establishes a preliminary showing of spoliation.

⁶*See* Ex. H. Peter Krawiec is identified as the custodian of this document as produced by Amazon. Bolles Decl. ¶ 14. In September 2019, Mr. Krawiec was Amazon's Senior Vice President of Worldwide Corporate and Business Development, and Carlo Bertucci was a Vice President for Corporate Development. *See* Peter Krawiec, LinkedIn, <https://www.linkedin.com/in/peter-krawiec-89a2121> (last visited April 25, 2024); Carlo Bertucci, LinkedIn, <https://www.linkedin.com/in/carlo-bertucci-1946294> (last visited April 25, 2024). Mr. Krawiec is a member of Amazon's senior leadership team. *See Amazon's S-Team: Meet the 31 members who make up our senior leadership team*, Amazon (Dec. 14, 2023), <https://www.aboutamazon.com/news/workplace/amazon-s-team-members>.

II. AMAZON’S FAILURE TO TAKE TIMELY ACTION TO PREVENT THE DESTRUCTION OF SIGNAL MESSAGES FURTHER ESTABLISHES A PRELIMINARY SHOWING OF SPOILIATION.

A party’s failure to take adequate steps to preserve information, such as by issuing timely preservation notices or taking action to stop automatic deletions, also establishes a preliminary showing of spoliation. *See Al Otro Lado*, 2020 WL 4432026, at *2 (finding that failure to instruct a custodian to “preserve relevant documents until . . . over a year after this litigation was initiated” was “sufficient to make a preliminary showing of spoliation”); *Cathode Ray Tube*, 2023 WL 5667882, at *3 (holding that company’s “more than eight-month delay before issuing any litigation hold is sufficient to establish a preliminary showing of spoliation” and “failure to suspend its automatic email destruction practice as soon as its duty to preserve arose further supports” the finding). Courts have explained that it is “reasonable to infer that relevant evidence has been destroyed” where steps are not taken to preserve it. *Tate & Lyle Americas, LLC v. Glatt Air Techniques, Inc.*, No. 2:13-cv-2037-EIL, 2014 WL 10209161, at *3 (C.D. Ill. Aug. 4, 2014); *see also City of Colton v. Am. Promotional Events, Inc.*, No. 5:09-cv-01864, 2011 WL 13223880, at *2, *5 (C.D. Cal. Nov. 22, 2011) (“[I]t is reasonable to infer from this lengthy delay [in issuing a preservation notice] that some relevant evidence was lost.”).

Amazon did not take timely steps to adequately preserve Signal messages. Amazon failed to issue a preservation notice to Jeff Bezos until April 13, 2020, ten months after the FTC’s June 17, 2019, document preservation letter put Amazon on notice that it was under investigation. Ex. D at 3; Ex. K. Mr. Bezos’ documents and communications were clearly within the scope of the investigation: as Amazon’s founder and CEO, he was the ultimate decision-maker at Amazon.

Mr. Bezos was a heavy Signal user, *see* Ex. B, and instructed others to use the app. *See* Ex. E, Ex. F at 279:20-25, Ex. G at 203:2-4; 208:17-209:2. Further, while Amazon issued preservation notices to other employees starting on July 2, 2019, Amazon did not issue custodial

questionnaires or conduct custodial interviews until the summer of 2020, and did not issue instructions about how to preserve Signal messages until October 2020. *See* Ex. D at 10; Ex. M. Given this delay, it is likely that Amazon’s custodians were not properly instructed to preserve Signal messages until over 15 months after Amazon was put on notice of Plaintiffs’ investigation. Together, these circumstances rise above the level of a preliminary showing of spoliation such that Amazon should be ordered to produce its preservation notices and instructions about preservation.

III. AMAZON’S PRESERVATION NOTICES AND INSTRUCTIONS ABOUT PRESERVATION WILL ASSIST IN DETERMINING THE EXTENT OF SPOLIATION IN THIS CASE.

Requiring Amazon to produce its preservation notices and instructions will shed light on the extent of spoliation in this case and its relevance to the record that will ultimately be before the Court. The Court may ultimately impose sanctions if it finds that “electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.” Fed. R. Civ. P. 37(e). If the spoliation was negligent, the Court may “order measures no greater than necessary to cure the prejudice.” Fed. R. Civ. P. 37(e)(1). If the spoliation was intentional, the Court may impose more severe sanctions. Fed. R. Civ. P. 37(e)(2).

The Court should allow Plaintiffs to assess the scope of Amazon’s spoliation of evidence and to determine whether Amazon’s spoliation was intentional. The documents Plaintiffs seek in this motion are relevant to both inquiries. Amazon’s preservation notices and instructions about preservation will show whether, when, and how Amazon employees were instructed to preserve Signal messages; whether, when, and how Amazon employees were instructed to preserve work-related materials on their phones; and whether any such instructions applied to communications

1 relevant to this case. Plaintiffs need these documents to assess whether Amazon failed to take
2 reasonable steps to preserve documents and to map out what information has been destroyed. *See*
3 *Thomas v. Cricket Wireless, LLC*, No. 19-cv-07270-WHA-AGT, 2020 WL 7344742, at *2 (N.D.
4 Cal. Dec. 14, 2020) (“[L]itigation holds and related correspondence are relevant to plaintiffs’
5 examination of [the defendant’s] document preservation practices and efforts and whether [the
6 defendant] spoliated relevant evidence.”).

7 Document hold notices and instructions about preservation are also relevant to
8 determining a party’s intent to destroy information, which bears on the appropriate sanction for
9 any spoliation. *See Al Otro Lado*, 2020 WL 4432026, at *2 (“[T]he content of the litigation hold
10 notice is relevant to a determination of whether the spoliation was willful or merely negligent.”);
11 *Stevens*, 2020 WL 7366318, at *5 (“Counsel’s mental impressions, conclusions, opinions, and
12 legal theories related to a litigation hold [and] general instructions regarding spoliation . . . are
13 directly at issue in determining the intentionality of the spoliation.”).

14 CONCLUSION

15 Plaintiffs have established a preliminary showing that Amazon engaged in spoliation.
16 Discovery into Amazon’s preservation notices and instructions about preservation is the next
17 step in uncovering the extent and intent underlying Amazon’s possible spoliation of evidence.
18 Accordingly, the Court should overrule Amazon’s objections and order Amazon to produce all
19 documents responsive to RFP Nos. 25 and 27.

1 Dated: April 25, 2024

I certify that this brief contains 3,468 words, in compliance with LCR 7(e)(4).

2 Respectfully submitted,

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